STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

December 6, 2017

Opinion No. 17-52

Member of General Assembly Serving on Board of Tennessee Valley Authority

Question

May a sitting member of the Tennessee General Assembly also serve on the Board of Directors of the Tennessee Valley Authority?

Opinion

No. Article II, § 26 of the Tennessee Constitution would prohibit a sitting member of the Tennessee General Assembly from simultaneously serving on the Board of Directors of the Tennessee Valley Authority. Membership on the TVA Board of Directors is an office under the authority of the United States, and article II, § 26 prohibits a person holding any office under the authority of the United States from also holding a seat in the Tennessee General Assembly. Membership on the TVA Board of Directors is, moreover, a compensated office, and article II, § 26 prohibits "any person in this State" from simultaneously holding more than one "lucrative office."

ANALYSIS

Article II, § 26 of the Tennessee Constitution[1] prohibits certain officeholders, including any "person holding any office under the authority of the United States," from also holding a seat in the Tennessee General Assembly. In addition, it prohibits "any person in this State" from simultaneously holding more than one "lucrative office."

Tennessee courts have not considered the meaning of "holding any office under the authority of the United States" in article II, § 26, but the Tennessee Supreme Court has construed similar language in article VI, § 7 of the Tennessee Constitution, which provides that the judges "shall not . . . hold any other office of trust or profit under this State or the United States." In

[1] The text of article II, section 26, is as follows:

> No Judge of any Court of law or equity, Secretary of State, Attorney General, Register, Clerk of any court of Record, or person holding any office under the authority of the United States, shall have a seat in the General Assembly; nor shall any person in this State hold more than one lucrative office at the same time; provided, that no appointment in the Militia, or to the office of Justice of Peace, shall be considered a lucrative office, or operative as a disqualification to a seat in either House of the General Assembly.

Frazier v. Elmore, 173 S.W.2d 563 (Tenn. 1943), the Tennessee Supreme Court held that the term "office" as used in art. VI, § 7

> must be given its broad meaning so as to effectuate the apparent intent of the constitutional prohibition against a diversion or division of the time and labor, energies and abilities of judges of our courts, which might destroy, or diminish their capacity to discharge the exacting duties of their responsible positions; and also to limit them to one source of compensation.

Id. at 565-66. Accordingly, the court held that a county judge who was inducted into service in the United States military one month after his election to office was holding an office of trust under the United States and receiving compensation in violation of article VI, § 7. *Id*.

The constitutions in some other states have prohibitions on holding multiple offices similar to Tennessee's constitutional prohibition. For example, the Delaware Constitution prohibits "any person holding or exercising any office under the United States" from simultaneously holding or exercising "any office of profit under this State." *See* Del. Const. art. III, § 11. In *Opinion of the Justices*, 647 A.2d 1104 (Del. 1994), the Delaware Supreme Court addressed whether this constitutional provision prohibited the governor of Delaware from being appointed to the Board of Directors of the National Railroad Passenger Corporation (Amtrak). Noting that the Delaware Constitution had always reflected a "desire to preserve the independence and undivided loyalty of its state officials by prohibiting the simultaneous holding of certain Delaware state offices and the public office of another "sovereignty," the court found that article III, § 11 prohibited the incumbent governor from simultaneously holding an "office under the United States." *Id*. at 1107-088. But, because the court also found service as an Amtrak director not to be an "office under the United States,"[2] it ultimately held that the governor would not violate the Delaware Constitution by serving on the Amtrak Board of Directors. *Id*. at 1109.

In *Opinion of the Justices*, 126 N.E.2d 115 (Mass. 1955), the Massachusetts Supreme Court addressed whether the Massachusetts governor could accept an appointment to the Federal Civil Defense Advisory Council without violating article VIII of the Articles of Amendment to the Massachusetts Constitution. Article VIII provided that "no person holding any office under the authority of the United States shall, at the same time, hold the office of governor, lieutenant governor, or councilor, or have a seat in the senate or house of representatives of this commonwealth." *Id*. at 117.

The key issue, then, was whether membership in the Civil Defense Advisory Council is an "office" and "under the authority" of the United States, in which case the governor would be "categorically forbidden to hold it." *Id*. The Massachusetts Supreme Court found that membership in the Council was indeed an office under the authority of the United States. While the duties of the Council were advisory only,

[2] The statute authorizing the creation of Amtrak expressly stated that Amtrak it is not "'an agency, instrumentality, authority, or entity, or establishment of the United States Government.'" *Id*. (quoting 45 U.S.C. § 541).

> it is not merely a casual group of voluntary advisers such as almost any government officer might from time to time ask to assist him. It is a body specially created by statute in the executive department of the government. Its members are appointed by the president for definite terms. They have specified duties to perform in that they are required to meet at least once a year and at other times upon call of the administrator, even if he does not ask for advice. Their work may so develop as to become of great importance. They may be paid for their services out of the Federal treasury. The statute itself speaks of them as holding "office."

Id. at 118. In light of these facts, the governor was constitutionally prohibited from serving as a member of that Council. *Id*.

Similarly, if appointment to the Board of Directors of the Tennessee Valley Authority (TVA) constitutes an "office under the authority of the United States," article II, § 26 of the Tennessee Constitution would prohibit an incumbent legislator from serving on that Board.

The TVA was created in 1933 by the federal Tennessee Valley Authority Act ("the Act"). With the Act, Congress authorized the creation of the "Tennessee Valley Authority," a corporation designed for the "purpose of maintaining and operating the properties now owned by the United States . . ., in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood water in the Tennessee River and Mississippi River Basins." 16 U.S.C. § 831. In the context of giving TVA access to the United States Patent and Trademark Office, the Act expressly refers to the TVA as "an instrumentality and agency of the Government of the United States" 16 U.S.C. § 831r.

The TVA Board of Directors is appointed by the President of the United States for a five year term and with annual compensation. 16 U.S.C. § 831(a). Among other powers, the Board is specifically given the power to exercise the right of eminent domain and to acquire real estate "in the name of the United States of America," which "real estate shall be entrusted to the Corporation as the agent of the United States." 16 U.S.C. § 831c(h). The Board is further given the power "in the name of the United States of America" to "transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States." 16 U.S.C. § 831c(k)(c).

The United States Supreme Court has recognized TVA's federal-agency status, *see Ashwander v. TVA*, 297 U.S. 288 (1936) (referring to TVA as "an agency of the Federal Government). The Sixth Circuit Court of Appeals has likewise recognized the TVA as an agency and instrumentality of the United States. *See Matheny v. TVA*, 557 F.3d 311, 320 (6th Cir. 2009) ("TVA is a 'wholly-owned corporate agency and instrumentality of the United States'").

Based on these facts, a directorship on the TVA Board of Directors would constitute an "office under the authority of the United States." Accordingly, because article II, § 26 of the Tennessee Constitution prohibits any "person holding any office under the authority of the United States," from also holding a seat in the Tennessee General Assembly, article II, § 26 would prohibit

a sitting member of the Tennessee General Assembly from simultaneously serving on the Board of Directors of the Tennessee Valley Authority.

Article II, § 26 also prohibits "any person in this State" from simultaneously holding more than one lucrative "office." This second constitutional prohibition may also apply here to bar an incumbent legislator from serving on the Board of Directors of TVA.

The majority of the cases construing this provision dealt only with whether a person may hold two lucrative *state* offices. *See, e.g., Phillips v. West*, 213 S.W.2d 3 (Tenn. 1948). However, in at least one case, the Tennessee Supreme Court has held that a person could not hold both a state and federal office at the same time. *Kelly v. Woodlee*, 133 S.W.2d 473, 474-75 (Tenn. 1939) (holding held that, pursuant to article II, § 26, a District Attorney General could not hold at the same time both lucrative offices of District Attorney General and United States Senator).

Tennessee courts have held that the concept of office "embraces the idea of tenure, duration, and continuity, and the duties connected therewith are generally continuing and permanent." *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978) (quoting 63 Am.Jur.2d *Public Officers and Employees*, § 10). Additionally, this Office has previously opined that an individual who holds an office takes an oath. *See* Op. Tenn. Att. Gen. 01-011 (citing Op. Tenn. Atty. Gen. U92-44 (April 10, 1992)). Thus, the concept of "office" applies here: Members of the TVA Board of Directors are required to take an oath of "office," and TVA employees are covered by the Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101, *et seq*., and the Federal Employees Compensation Act, 5 U.S.C. §§ 8101, *et seq*. Members of the TVA Board of Directors serve for a five-year period and have ongoing and continuous duties. They are compensated for their service; the office is a lucrative one.

In sum, article II, § 26 of the Tennessee Constitution would prohibit a sitting member of the Tennessee General Assembly from simultaneously serving on the Board of Directors of the Tennessee Valley Authority. Membership on the TVA Board of Directors is an office under the authority of the United States, and article II, § 26 prohibits a person holding any office under the authority of the United States from also holding a seat in the Tennessee General Assembly. Membership on the TVA Board of Directors is, moreover, a compensated office, and article II, § 26 prohibits "any person in this State" from simultaneously holding more than one "lucrative office."

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